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Chairman: Mrs. FLORES (Uruguay)

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The meeting was called to order at 10.30 a.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/170-S/25801 and A/48/303)

1. Mr. FSADNI (Malta) said that his delegation had taken note of the International Law Commission's consideration of the ninth report of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law, and of the first report of the Special Rapporteur on the law of the non-navigational uses of international watercourses. His delegation had also taken note of the substantial progress registered in the Commission's work on the sensitive topic of State responsibility.

2. Turning to the question of the draft statute for an international criminal court, he said that his delegation supported the establishment of such a court, which should preferably be an organ of the United Nations. However, in the light of the practical and technical difficulties raised by a number of delegations, in particular, the controversy on whether such an option would necessitate an amendment to the Charter, his delegation could agree to the establishment of the court by a statute in the form of a treaty entered into by States. If that option was adopted, it would be essential to create, through appropriate agreements, a close cooperative relationship between the court and the United Nations, as that would greatly enhance the court's authority and effectiveness as well as its universal appeal.

3. Noting that article 4 of the draft statute provided for a court which would not be a full-time body, but would sit when required, he said that his delegation still had difficulty with that approach. The weakening of the court that would be caused by the lack of continuity and its diminished independence and authority might undermine its continued existence. The possibility, mentioned in the Working Group's commentary to article 10, that the president of the court might become full-time if circumstances required it, did little to redress his delegation's concerns. The rest of part 1 (articles 1-21) presented few problems for his delegation. While supporting the Working Group's adoption of the principle that judges should not be eligible for re-election, his delegation felt that the 12-year term could be shortened.

4. Turning to part 2 of the draft statute, dealing with jurisdiction and applicable law, he said that his delegation shared the Working Group's basic approach to the court's jurisdiction ratione materiae. The compilation of a list of crimes defined by treaties such as that found in article 22 could provide the core of such jurisdiction. With regard to article 23, his delegation reaffirmed its position in favour of a flexible jurisdictional regime. Both the "opting in" system (alternative A) and the "opting out" systems (alternatives B and C) achieved the aim of allowing States which desired to become parties to the Statute to decide over which crimes they would be prepared to accept the court's jurisdiction. The initial presumption in favour of the lack of jurisdiction of the court in alternative A would probably make that alternative appear less inhibiting to potential States parties.

(Mr. Fsadni, Malta)

5. On the separate jurisdictional issue of the linkage between the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court, his delegation reiterated its concern that such a linkage could prove detrimental to the early establishment of the court and should be avoided. It was therefore pleased to note that the Working Group's draft statute in effect separated the establishment of the court from the entry into force of the draft Code. He had taken note of the difficulties raised by some delegations with regard to article 24, relating to the consent required from interested States for the court to exercise its jurisdiction under articles 22 and 23. He understood the logic explained in the Working Group's commentary to article 25, which granted the Security Council the power to refer cases to the court. However, the drafting of the article could be improved in the light of paragraph (2) of the commentary. Article 26 (2) (a), which provided for the court's jurisdiction over crimes under general international law, might give rise to concerns over the proper application of the principle of nullum crimen sine lege, since it was arguable whether such crimes were defined with a precision that was acceptable as a basis for criminal jurisdiction.

6. His delegation was largely in agreement with parts 3 to 7 of the draft statute, which dealt with several procedural issues of fundamental importance. It noted with approval that article 53 did not empower the court to award capital punishment. The possibility, albeit restricted, of holding trials in absentia, provided for in article 44 (1) (h), was something which his delegation would like to see eliminated in a revised draft statute.

7. Malta looked forward to the early submission by the Commission of a revised version of the draft statute that had been prepared by the Working Group. He wished to reaffirm his delegation's position that it interpreted the granting of the mandate in General Assembly resolution 47/33, paragraph 6, as an expression of the commitment of the Assembly to continue the process leading to the establishment of an international criminal court.

8. Mr. CASTELLI (Argentina) said that his delegation had always attached great importance to the topic "international liability for injurious consequences arising out of acts not prohibited by international law" (A/48/10, chap. III), and regretted that the International Law Commission had not assigned it due priority. It was unfortunate that the Drafting Committee should have worked so slowly, but it was encouraging to note that the Commission had accelerated its work on the matter at its forty-fifth session. He noted that the ninth report of the Special Rapporteur was devoted to issues relating to prevention in respect of activities having a risk of causing transboundary harm. In general, his delegation agreed with the Special Rapporteur's proposals; as far as details were concerned, he felt that it would be more practical to wait until the definitive texts were submitted. At any rate, the legal obligations envisaged were already set forth in a number of recent instruments on hazardous activities, and were beginning to be viewed as standard. That was the case, for example, with issues such as prior authorization; transboundary impact assessment; notification and information; exchange of information; and prior consultation.

9. Article 14 imposed on the so-called "State of origin" substantive obligations, i.e., that State was required to enact the necessary legislation to

(Mr. Castelli, Argentina)

ensure that private operators took the necessary precautions to prevent their activity from producing transboundary harm, and to take every measure required to enforce the legislation. State supervision was indeed necessary, and hence the need for due diligence. It was worth pointing out that, as the Special Rapporteur had stressed, the provisions on due diligence were not of the nature of what might be called the obligation of result, in the sense of article 23 of part one of the draft articles on State Responsibility.

10. His delegation noted that the plan presented by the Commission was in keeping with international practice in all cases of specific activities that were the subject of international instruments. In general, prevention was dealt with in separate instruments from those which addressed liability issues; however, both the Commission and the General Assembly had considered that an attempt should be made to include provisions on prevention in a draft which had originally been intended to deal only with liability. It would therefore appear logical to bring together into one chapter on prevention all those obligations which had been covered in the instruments dealing with prevention, and then add a chapter on liability which would also reflect the definitive trend in that area. Thus, what would emerge would be a regime of State liability in the event of non-compliance with obligations relating to due diligence or procedural obligations, and another regime of civil liability of the operator in the event that the State had complied with its duties but the activity had still resulted in transboundary harm. In such cases, the State would not be liable, unless the Commission and the General Assembly wished to assign it residual liability in certain exceptional cases. At any rate, his delegation would be opposed to any attempt to reduce the draft to dealing only with prevention issues, inasmuch as that would be contrary to the mandate of the General Assembly, which concerned liability.

11. On the matter of prevention, ex ante and ex post, he said that his delegation understood that prevention ex post had to do with preventing definitive harm after the accident. In such cases, it was important to refer to harmful effects rather than to harm, inasmuch as harmful effects could be controlled and reduced, whereas harm was definitive and any measure taken to deal with that fell within the sphere of reparation.

12. Turning to the question of dispute settlement procedures, he said that two aspects should be considered, i.e., one relating to disputes regarding the interpretation and application of the draft, and another relating to consultation. The second aspect, which was narrow in scope, was very important. Disagreements might arise with regard to the facts, as in a case where the activity in question was not regarded as entailing risk at the level dealt with in the draft, or where there were differences of opinion as to the harmfulness of the substances used. In such cases, it would be very useful to provide for a verification procedure of a purely advisory nature.

13. Several delegations had expressed concern regarding the global commons, and his Government held the view that the matter should be taken up again by the Commission. Consideration might be given to the possibility of extending the obligation of prevention, albeit without liability, with regard to the global commons or at least, in the chapter on principles, of stating the general concept that the global commons must not be harmed. That would be useful

(Mr. Castelli, Argentina)

because it would be a first step towards establishing the principle that it was unlawful to harm the global commons, even though it might be difficult in practice to enforce the prohibition, and the remainder of the draft did not provide for such enforcement.

14. His delegation hoped that in 1994 the Drafting Committee would complete its work on prevention, in order to enable the Sixth Committee to consider a complete chapter. He also hoped that in future, the item would be assigned the priority it deserved.

15. Turning to the topic "The law of the non-navigational uses of international watercourses" (A/48/10, chap. V), he said that he agreed with the Special Rapporteur that the second reading of the draft articles on the topic should be limited to a "fine-tuning". On the question of whether the eventual form of the article should be a framework convention or model rules, he said that his delegation had always held that a framework convention should be drawn up. On the matter of dispute settlement procedures, he said that his delegation agreed to the inclusion of articles on that topic, particularly with regard to mandatory conciliation. It was in favour of retaining the expression "flowing into a common terminus" in article 2 (b). With regard to the issue of confined groundwaters, his Government considered that the Commission had acted wisely in asking the Special Rapporteur to study the matter further.

16. As to the discussion with regard to whether to replace the word "appreciable" by the word "significant", he said that his delegation did not wish to comment on the English text, but it did wish to stress that it was essential that the threshold should not be raised above the meaning of the Spanish term "daño sensible", which was used in many conventions, including some to which Argentina was a party. The English word "significant" should not be translated as "importante". His delegation insisted that the term "daño sensible" should be retained in the Spanish version.

17. With regard to the relationship between "equitable and reasonable utilization" (article 5) and the "obligation not to cause appreciable harm" (or "daño sensible") (article 7), he felt that the change that had been made could alter the balance of the draft. It did not seem advisable to use a subjective and vague criterion such as "equitable and reasonable utilization" with regard to harm, even with the exception relating to pollution.

18. Article 4, which established the right of a watercourse State to participate in negotiations or consultations and even to become a party to any watercourse agreement that applied to the entire international watercourse, was unduly favourable to the third State. The text should be replaced by another one allowing a third State the possibility, rather than the right, to become a party to the treaty, and making the accession of the third State subject to certain terms and conditions to be agreed upon between that State and the States parties to the agreement or those participating in the use or the specific programme. The rights of third States were already protected in other draft articles. The wording which his Government proposed was that included in its observations on the draft as set forth in document A/CN.4/447/Add.1.

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19. His Government also considered it important, in order to ensure that the draft articles did not affect pre-existing agreements on the uses of watercourses, to include a text establishing beyond any doubt that the future agreement on the non-navigational uses of international watercourses was subsidiary in nature, and that it did not apply to any watercourses that were already governed by a convention, unless the States parties to that convention reached an agreement on the matter.

20. He noted that the Commission had proposed the inclusion in its agenda of the topics "State succession and its impact on the nationality of natural and legal persons" and "The law and practice relating to reservations to treaties". Bearing in mind that those items could probably be dealt with expeditiously, his delegation hoped that the Commission would undertake its work on them as soon as possible.

21. Mr. AL-BAHARNA (Bahrain), referring to chapter V of document A/48/10, said that, with regard to the form of the draft articles, his delegation shared the view of most members of the Commission who had expressed preference for a framework convention (para. 347). As the Commission had always proceeded in the past on the basis that a binding instrument was to be adopted, and as nothing had happened to warrant a change in that approach, his delegation opposed any attempt to dilute the results achieved so far in the development of legal norms on the topic.

22. Bahrain shared the Special Rapporteur's view concerning the need for a tailored set of provisions on fact-finding and dispute settlement (para. 351) and noted with satisfaction that the majority of the Commission's members also endorsed that approach (para. 352). It would be a glaring omission if the Commission should fail to adopt provisions on fact-finding and dispute settlement since, as the needs of populations for water increased, and water resources became scarcer, disputes over the use of international watercourses could only proliferate.

23. While the Special Rapporteur had stated that the draft articles required only "fine-tuning", his delegation noted with concern the view expressed in the Commission that a deep overhaul of the articles appeared to be advisable (para. 358). As the articles had been approved by the Commission on first reading in 1990, the time for an overhaul was long past. His delegation therefore cautioned against substantive revision.

24. With regard to article 1 (Scope of the present articles), the Commission had considered whether the term "international watercourses" should be replaced by "international drainage basin" or "transboundary waters". His delegation saw little justification for changing a decision arrived at following exhaustive discussion by the Commission.

25. With regard to article 2 (Use of terms), his delegation agreed with those members of the Commission who had opposed the deletion from article 2 (b) of the phrase "flowing into a common terminus". As to whether confined groundwaters should be included in the scope of the draft articles, while his delegation supported the regulation of confined groundwaters, it agreed that the question called for a different set of rules (para. 368).

(Mr. Al-Baharna, Bahrain)

26. With regard to article 3 (Watercourse agreements), his delegation supported the replacement of the adjective "appreciable" with "significant", because it believed the second term to be far less esoteric than the first. However, if the term "significant" was used in article 3, then it should also be used in article 4, paragraph 2, articles 7 and 12, article 18, paragraph 1, and article 21, paragraph 2.

27. The issue of the relationship of the draft articles to existing agreements was relatively more complex. The Special Rapporteur's suggestion that States should indicate their understanding of the situation in relation to existing agreements at the time of ratification had been unacceptable to most members of the Commission, who had felt that the matter should be left to be governed by the law of treaties (para. 387), a position which his delegation endorsed.

28. Article 4 (Parties to watercourse agreements) was generally acceptable to his delegation, as it was to most members of the Commission. However, Bahrain believed that article 4, paragraph 2, should not be deleted, nor should it be merged with paragraph 1, as the two paragraphs dealt with different aspects of participation in watercourse agreements.

29. While his delegation shared the Special Rapporteur's view that article 5 (Equitable and reasonable utilization and participation) and article 7 (Obligation not to cause appreciable harm) constituted the core general principles of the draft articles, it was not persuaded by the Special Rapporteur's proposal to revise article 7. While articles 5 and 7 were related to each other, each of them had its own significance in terms of scope and application. Whereas article 5 enabled States to participate in a variety of ways in the optimum utilization of watercourses, article 7 imposed on States an obligation not to cause appreciable harm to other watercourse States in their utilization of a watercourse. Accordingly, Bahrain did not support either the deletion of article 7, as had been suggested by some members of the Commission (para. 403), or the modification of article 7 along the lines proposed by the Special Rapporteur. In Bahrain's view, the Special Rapporteur's proposal would radically alter the status quo in favour of pollution and would upset the balance of the draft articles as a whole. Nevertheless, his delegation was ready to accept the integration of the "due diligence" principles into article 7 (para. 404).

30. Lastly, articles 8 to 10 did not call for any modifications.

31. Mr. Young Hee HAHN (Republic of Korea), referring to chapter III of document A/48/10, said that the topic of international liability had taken on increased significance in recent times because of the growing international awareness of the need to regulate activities causing transboundary harm to the environment. That situation underscored the need for further concerted efforts on the part of the international community. Accordingly, his delegation welcomed the importance which the Commission attached to the topic, and believed that the outcome of the Commission's work should be a legally binding instrument, so as to avoid all ambiguity with regard to the nature of international liability.

(Mr. Young Hee Hahn, Republic of Korea)

32. As requested by the Commission, the Special Rapporteur had devoted his ninth report to the issue of prevention only in respect of activities having a risk of causing transboundary harm (para. 105 (d) (vi)). His delegation shared the concern expressed by other delegations that the regime of prevention should in no way be regarded as an alternative to the regime of compensation, without which innocent injured parties would hardly be protected.

33. With regard to determining the classes of activities having a risk of causing appreciable transboundary harm, his delegation believed that, while it was neither feasible nor desirable to draw up an exhaustive list of such activities, it was none the less important for the Commission to identify them more precisely so that the draft articles on prevention could deal more appropriately with the diversity of activities and risks involved. Such a need was closely related to the "due diligence" obligation not to cause harm. The Commission appeared to be suggesting that a State which complied with its "due diligence" obligation was not liable in the event that transboundary harm occurred. While his delegation had reservations about introducing the concept of strict liability for every type of activity, as that would impose excessive burdens on the State of origin, it none the less believed that at least some types of activities, such as those which were ultra-hazardous, should entail liability regardless of due diligence if transboundary harm occurred. Accordingly, such activities must first be categorized according to the relevant criteria.

34. With regard to the meaning of prevention, his delegation believed that prevention ex post, in other words, measures to be taken following an accident in order to minimize the scope and gravity of the harm caused, was closer to the concept of remedial measures. Accordingly, such measures should more properly be addressed at a later stage.

35. His delegation noted with appreciation the consideration given to the needs of developing countries and welcomed the proposal to include a provision dealing with the special situation of those countries. However, such a provision should not be unduly general, as that would make its practical implementation difficult, nor should it be overly specific, since the Commission was called upon to formulate generally applicable rules.

36. Draft articles 11 to 20 bis, while providing a sound basis for future work, required further elaboration and improvement.

37. Turning to chapter V of document A/48/10, his delegation noted with satisfaction that the Drafting Committee had adopted, on second reading, articles 1 to 6 and 8 to 10. With regard to the replacement of the adjective "appreciable" with "significant", his delegation believed that such a change went further than the necessary distinction between inconsequential harm that could not even be measured, on the one hand, and consequential harm, on the other. Accordingly, careful consideration should be given to the effect of the change, especially its potential to raise the threshold in terms of controlling the free use of international watercourses, and its possible ramifications with respect to the question of international liability, before a decision was adopted.

(Mr. Young Hee Hahn, Republic of Korea)

38. With regard to the Commission's long-term programme of work (A/48/10, chap. VI), his delegation welcomed the Commission's decision to incorporate into its agenda the topics "Law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". The subject of reservations to treaties was one of the most difficult issues in treaty law. While the 1969 Vienna Convention on the Law of Treaties and the other Vienna Conventions set out some principles in that regard, many issues had remained unresolved. Furthermore, State practice did not appear to be in conformity with the rules provided. Despite the possibly thorny issue of the relationship between the Vienna Convention and the Commission's work on the topic, his delegation found it timely and appropriate for the Commission to take up the issue.

39. The question of State succession and its impact on nationality was a neglected area from the standpoint of positive law, although there had long been an abundance of State practice in that area. Recent political developments clearly demonstrated the continuing importance of the question. The prompt formulation of guidelines, without prejudice to the final form which they might take, would be the best approach.

40. Mr. NEGA (Ethiopia), referring to chapter V of document A/48/10, said that, as a watercourse State, his country attached great importance to the Commission's work on the topic. Likewise, the questions relating to the legal regime for and use of international watercourses gave rise to various important concepts and principles, including the principle of the sovereign right of a watercourse State to optimal utilization of the water under its territorial jurisdiction, and the obligation to cooperate with other States that shared the same international watercourse. Those two principles were harmonized in draft article 5 (Equitable and reasonable utilization and participation).

41. Since the various dimensions of the issue required international regulation and cooperation, Ethiopia favoured the adoption of a framework convention rather than model rules. Such a convention would provide an effective guide for States parties in their efforts to work out the agreements required under specific circumstances.

42. One of the main objectives of the legal regulation of the non-navigational uses of international watercourses was preventing disputes and, when they did arise, ensuring their settlement exclusively by peaceful means. The inclusion of dispute settlement provisions in the draft articles would serve those objectives and would make the envisaged legal instrument complete and effective.

43. Mr. AHMED (India), referring to chapter V of document A/48/10, said that, with regard to the final form of the draft articles, his delegation favoured a framework convention. Such a convention would provide the general principles and rules for the non-navigational uses of international watercourses and would serve as a guideline for future agreements.

44. His delegation was in favour of including in the draft articles provisions relating to dispute settlement procedures, provided that such provisions preserved States' rights to choose freely the means by which such disputes would be settled, as provided for under Article 33 of the Charter of the United

(Mr. Ahmed, India)

Nations. The dispute settlement procedure to be elaborated should not be mandatory. Given the variety of international watercourses that existed, there might be a need for different procedures for different cases. Moreover, disputes relating to the use of international watercourses were of a special nature and called for special settlement procedures.

45. His delegation welcomed the Special Rapporteur's efforts to integrate contemporary environmental concerns into the law dealing with international watercourses. In drafting the articles on that topic, the Commission should ensure that due consideration was given to the relevant environmental issues, which should be dealt with largely within the framework of cooperation between States. The Commission should avoid elaborating water use restrictions which might be contrary to the interests of groups that were dependent on such waters. Furthermore, in dealing with the environmental issues connected with international watercourse, the Commission should give due regard to three principles: State sovereignty over natural resources, the sovereign equality of States, and respect for the territorial integrity of States.

46. His delegation endorsed the content of draft article 1 (Scope of the present articles). Any conflict between navigational and non-navigational uses of international watercourses should be viewed in the context of managing multiple use.

47. The phase "flowing into a common terminus" in article 2 (b) should be maintained as it helped to define the scope of the article clearly. In his view, the subject of confined groundwaters should not be included in the topic of international watercourses; furthermore, the Commission should complete its second reading of the draft articles without adding a new topic to its agenda at such a late stage.

48. He welcomed the Special Rapporteur's suggestion that in article 3, paragraph 2, the word "appreciable" should be replaced by "significant". That suggestion had received widespread support and was in line with recent developments in environmental law. It was compatible with the need to establish a uniform and legally recognizable standard of harm as opposed to a merely objective threshold and would make the draft articles more acceptable to States.

49. It was important to make clear as article 3, paragraph 3, had done, that the draft articles did not in any way affect existing treaties between States, which had the sovereign right to make such changes as they considered necessary. The aim of the draft articles was simply to provide a framework convention or model rules.

50. His delegation was satisfied with draft article 4 (Parties to watercourse agreements) as it stood.

51. In his delegation's view, the entitlement of a State to equitable and reasonable utilization of international watercourses, as provided for in draft article 5, was subordinate to the State's obligations to promote the optimal utilization of the watercourse and the consequent benefits, in a manner consistent with adequate protection of the watercourse. In practice, optimal utilization generally meant that States relied on their own capabilities and

(Mr. Ahmed, India)

resources to maximize benefits, subject to the requirements of economy and the need to protect the watercourse and to avoid causing significant harm to other co-riparian States. In that connection, he wished to stress that equitable utilization did not mean equal utilization. The criterion of reasonable utilization should contribute to achieving a balance between the needs and interests of the various watercourse States.

52. Paragraph 2 of article 5 was superfluous and should be deleted: the obligation to participate in an equitable manner was nothing more than the duty to cooperate, which was elaborated in greater detail in article 8. Article 5 should concentrate on the principle of equitable and reasonable use as reflected in article IV of the Helsinki draft on uses of waters of international rivers of 1966 which, in comparison with draft article 5, set forth the rights of watercourse States more positively.

53. While the set of factors relevant to equitable and reasonable use contained in article 6 were useful, a proper balance among them needed to be ensured. The concept of "existing uses", contained in paragraph (d) of the article, represented for some States an important factor in measuring significant or substantial harm. The factor of existing uses had to be reconciled with the development needs of States and, accordingly, the article should remain as it stood.

54. Article 7 (Obligation not to cause appreciable harm) was repetitive of earlier articles and should be deleted. It undermined the principle of equitable and reasonable use and might allow a State to veto another State's use of or plans for use of a watercourse. Such a veto was prohibited by international law.

55. Article 9 (Regular exchange of data and information) was prescriptive in nature. Article 10 (Relationship between uses) reaffirmed the need to balance the various uses of a watercourse while attempting to reconcile any conflicts that might arise from such uses.

56. Mr. ABDELLAH (Tunisia), referring to the draft statue for an international criminal tribunal (A/48/10, annex), said that an international criminal tribunal was urgently needed: while international crime had increased since the Second World War, the international community lacked an effective legal mechanism to deal with it.

57. The court should be a permanent institution; that would ensure its authority and credibility and provide greater guarantees. The court should also be an organ of the United Nations, which would help it gain universal recognition.

58. His delegation agreed with the Commission that the court's jurisdiction ratione personae should be limited to individuals. As to jurisdiction ratione materiae, it favoured alternative A of draft article 23, under which a State, whether or not it was party to the statute, could, by declaration, accept at any time the jurisdiction of the court over one or more of the crimes referred to in article 22. In that connection, the crime of torture, as defined in the

(Mr. Abdellah, Tunisia)

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, should be added to the list of crimes contained in article 22.

59. The international treaties and agreements referred to in article 22 of the draft statute did not contain provisions relating to penalties. Under article 53, in determining penalties the court could have regard to the penalties provided for by the law of the State of origin of the perpetrator of the crime, the law of the State on whose territory the crime was committed, or the law of the State which had jurisdiction over the accused. However, under such a system, individuals who had committed the same type of international crime could be subject to different penalties. For that reason, his delegation had encouraged the Commission to continue its work on the draft Code of Crimes against the Peace and Security of Mankind, which, by precisely defining international crimes and the applicable penalties, would constitute the applicable law in the matter. In the absence of such a code, any statute for an international criminal tribunal would be ineffective.

60. His delegation welcomed the fact that the indictment would be prepared by the prosecutor and not by the State bringing the claim, as that would ensure the court's neutrality and impartiality. It also agreed that, as envisaged in the statute, the investigation of the crime should be conducted by the tribunal. The investigation of highly complex cases could, if necessary, be referred to a special commission.

61. The right to refer cases to the court should also be granted to international organizations, in particular those working in the field of human rights. That power should also be extended to the General Assembly, which, under the Charter of the United Nations, was instrumental in maintaining international peace and security. In addition, the General Assembly should have a say in the appointment of judges to the court.

62. Turning to chapter III of document A/48/10, he said that the elaboration of rules on international liability would contribute to the codification and progressive development of environmental law. He took note of the fact that the Commission had agreed that after considering the issue of prevention of transboundary harm, it would turn to the question of elaborating rules relating to compensation for harm. It was a matter of concern to his delegation that developing countries might have difficulty in meeting their obligations to take preventive measures; accordingly, provisions taking account of the special situation of those countries should be incorporated into the relevant draft articles.

63. In respect of chapter IV of document A/48/10, he recalled that the Special Rapporteur on the topic of State responsibility had proposed a three-tier dispute settlement procedure as a way of mitigating difficulties that might arise from the use of countermeasures. Members of the Commission had been divided on the issue of including in the articles a compulsory dispute settlement procedure. His own country, which had always believed in settling disputes by peaceful means, considered that such a procedure might be in violation of Article 33 of the Charter, under which the parties to a dispute had to seek a solution by peaceful means of their choice. The proposed dispute settlement procedure also seemed to violate the principle under which the

(Mr. Abdellah, Tunisia)

jurisdiction of the International Court of Justice was recognized. Lastly, in his view, countermeasures should be subject to severe restrictions in order to limit their use.

64. Mr. HUSSAIN (Pakistan) said that his delegation attached great importance to the topic of international watercourses and hoped that the Commission would complete its second reading of the draft articles at its next session. Agriculture was the mainstay of his country's economy and the availability of fresh water was vital to both agricultural and domestic activities in Pakistan.

65. Where a river crossed the territories of two or more States, the lower riparian States were always at a disadvantage relative to the upper ones. Thus, any rules governing the use of international watercourse, must be fair, balanced and based on the principles of equitable utilization, conservation and protection by all watercourse States. In particular, there should be an equitable balance between the rights of lower and upper riparian States. In addition, watercourse States must cooperate with each other in resolving issues related to the adverse effects that might arise from the use of watercourses.

66. With regard to the final form of the draft articles on international watercourses, the majority view in the Commission had favoured a framework convention, a view broadly endorsed by the members of the Sixth Committee, including his own delegation.

67. The Special Rapporteur had raised the question of including dispute settlement procedures in the draft articles. Population increases would invariably increase demands on finite fresh-water resources and disputes on the utilization of watercourses might well proliferate. He therefore agreed with the majority view that dispute settlement procedures should be incorporated into the articles.

68. In his opinion, it would be inappropriate to include confined groundwaters in the concept of a "watercourse". Article 2 (b) defined a watercourse as "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus". He had difficulty in understanding how confined groundwaters could be so envisaged and shared the view that they did not come within the scope of the articles.

69. The discussions on article 3 had focused mainly on the replacement of the word "appreciable" by "significant" and on the question of how to deal with existing watercourse agreements. His delegation preferred the retention of the word "appreciable". Furthermore, existing agreements should continue to bind all parties to such agreements and no change should be made except by a mechanism provided in the agreements themselves. Accordingly, the Special Rapporteur should consider a provision which would protect the existing agreements. His delegation supported article 3 as currently drafted.

70. Article 5 stated the principle that States should "in their respective territories utilize an international watercourse in an equitable and reasonable manner", while article 7 stipulated that watercourse States were under obligation to "utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States". His delegation favoured

(Mr. Hussain, Pakistan)

the incorporation in article 7 of the interesting concept of "due diligence" proposed by the Special Rapporteur.

71. With respect to article 10, his delegation believed that special attention must be given to the equitable utilization, protection and preservation of water resources by all watercourse States.

72. Turning to the topic "Draft Code of Crimes against the Peace and Security of Mankind", he noted that the establishment of an international criminal tribunal involved many complex and difficult issues, including, inter alia, questions of jurisdiction, applicable law, structure of the court, prosecution and other related matters. The topic therefore deserved particular attention and his delegation would continue to participate in the debate on the subject in a constructive manner.

73. Part 2 of the draft statute for an international criminal tribunal (A/48/10, annex) dealt with the question of jurisdiction and applicable law. He took note of the reservations expressed by many speakers on the distinction drawn by the Working Group between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of undesirable conduct that constituted crimes under national law.

74. Articles 22 and 26 raised serious questions on which divergent views had been expressed by members of the Commission. His delegation agreed with the view that, with the single exception of the Convention on the Prevention and Punishment of the Crime of Genocide, none of the instruments listed in article 22 had been drawn up with due consideration of the possibility of bringing crimes they defined before an international tribunal. Moreover, none of the instruments set penalties. It was a basic principle of criminal law that offences must be clearly defined and punishment prescribed for those crimes. The crime should be investigated under the local laws of States. Furthermore, a code of criminal procedure was necessary for the trial of the alleged perpetrators of criminal offences and for investigation of the crimes allegedly committed by them. Because States had different methods and procedures for investigation and trial under their existing laws, they would have to adopt the measures necessary to accommodate the proposed international criminal tribunal. The law of evidence had to be codified in order to draw a line between admissible and inadmissible evidence, thereby ensuring the fair trial of the accused.

75. The problem with the proposed code was the absence of adequate substantive laws which the court could apply. International crimes were not precisely defined, and penalties had not been prescribed. In the absence of an internationally accepted codified evidence act or code of criminal procedure, it was important to develop the necessary substantive laws before an international criminal jurisdiction was established. He hoped that the Commission would make further progress on the draft Code of Crimes against the Peace and Security of Mankind, which might provide the necessary substantive law for the proposed international criminal tribunal.

(Mr. Hussain, Pakistan)

76. The term of 12 years prescribed in article 7 of the draft statute for the judges of the international criminal court was excessive. Also, even though it was a recognized principle of criminal law that the parties involved in the case should be given at least one chance of appeal, articles 55 and 56 did not contemplate a separate appellate court. There was therefore need to set up an appellate authority to hear appeals against the judgement of the court.

77. The establishment of an international criminal court with its supporting organs and other infrastructure, including expenses during trial, involved huge financial resources which might constitute an extra burden on the scarce resources of developing States. Consequently, while his delegation agreed in principle with the idea of establishing such a jurisdiction, it had serious reservations about the hasty manner in which that important issue was being handled. Moreover, no real progress could be made without developing substantive criminal laws, precisely defining international crimes, and prescribing penalties for various international crimes.

78. Mr. GARNJANA-GOONCHORN (Thailand) said that the Commission's work was acquiring increasing importance in the new international environment. Chapter II of its report - and the annex to the report, which contained a draft statute for an international criminal tribunal - represented a far-reaching effort to address an important need of the international community. In order for the future tribunal to be effective, its statute must be universal and must provide for international crimes committed in all possible locations or circumstances. Such universality was difficult to achieve, however, given that relations between States were conducted on a consensual basis. While consent might be forthcoming for establishing the tribunal, endowing it with the requisite jurisdiction and obtaining the cooperation of States on the various aspects of due process, the absence of consent could frustrate the noble ideals which inspired the undertaking.

79. That dilemma went to the root of the draft statute, and could not be lightly dismissed. Draft article 2 of the statute, for example, provided that the tribunal should become a judicial organ of the United Nations. That represented more than an effort to confer upon the tribunal the necessary dignity and prestige; such a relationship between the tribunal and the United Nations might be seen as an attempt to achieve universality by making the statute automatically binding upon those Members of the Organization which, for their own reasons, chose not to become parties to the statute. Should there be a significant number of such non-parties, then the issue of the relationship in question would become literally an issue of life and death for the future tribunal.

80. The dilemma of consent was strikingly illustrated in draft article 23, which dealt with the modalities of acceptance by States of the court's jurisdiction over the crimes listed in article 22. Given that universality was the aim, alternatives B and C embodying the "opting out" approach would at first glance appear to be the better choice, creating a presumption of automatic acceptance of the court's jurisdiction over the crimes in question. Paradoxically, however, the more flexible "opting in" approach of alternative A could lead to wider participation by States in the statute itself.

(Mr. Garnjana-Goonchorn, Thailand)

81. Draft article 59, on cooperation with States non-parties to the statute, also graphically illustrated the difficult task of reconciling the aim of universality with consent, given the basic tenet of treaty law that agreements or treaties did not bind third parties. Nonetheless, draft article 59 "encouraged" cooperation by non-parties on the basis of, inter alia, comity, ad hoc arrangements, or agreement between the State and the court on such matters as arrest, detention and the surrender of persons. Comity, however, had found no place in the relevant provisions of the Vienna Convention on the Law of Treaties, which dealt with rules regarding treaties and third States. Secondly, a reference to ad hoc arrangements or agreements with the court begged the question of why consent to participate in the statute and acceptance of the court's jurisdiction had not been forthcoming in the first place. Moreover, certain States might be labouring under impediments contained in their national laws and constitutions.

82. On the question of subject-matter jurisdiction, contained in articles 22 and 26, his delegation appreciated the difficulties involved in establishing the categories of crimes which should be brought before the court. Although offences were normally considered to have an international character when they involved the violation of standards vital to the interest of the international community, his delegation wondered whether it might be tantamount to usurpation of the role of domestic courts if jurisdiction were given to the international court over crimes which could be punished in domestic courts, backed by an extensive network of extradition arrangements.

83. His Government would keep an open mind with regard to the establishment and role of the tribunal. His comments reflected concerns about certain compelling aspects of the draft statute and, in particular, the need to strive for a broad consensus among States. It was also important to determine how best to relate the statute to non-parties without minimizing the impediments that might be contained in their respective national laws and constitutions.

84. Turning to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he welcomed the Commission's attempt to elucidate and substantiate an area of international law, many aspects of which were still clouded in ambiguity. Given the priority attached to economic development on national agendas around the world and his own country's efforts to deregulate its economy and to attract investment, his delegation attached great importance to practicality. States must know the prescribed limits on their rights and duties in that area as signposts for their own domestic legislation and in order to craft satisfactory legal relationships with other Governments and operators. One of the crucial tests that might be applied to the Commission's ongoing effort was that of clarity, with regard not only to rights and duties, but also to the interrelated concepts of risk, harm and prevention.

85. A further point of concern at the current stage was the question of pre-existing activities contained in draft article 13, which appeared to prescribe a general kind of liability on the part of States for any harm caused. That provision might induce States to modify pre-existing legal relationships or even, in some circumstances, to enact legislation that disregarded the principle of non-retroactivity.

(Mr. Garnjana-Goonchorn, Thailand)

86. Referring to chapter IV of the report, concerning State responsibility, he said that countermeasures gave rise to serious questions with regard to legality and the possibility of abuse. He shared the view that the application of countermeasures must be limited to the purpose of inducing the wrongdoing State to comply with its obligations under draft articles 6 to 10 bis relating to the consequences of wrongdoing. The draft articles already contained a set of substantive rules prescribing limits on the use of countermeasures.

87. His delegation did not support the Special Rapporteur's proposal to prescribe compulsory dispute settlement procedures, since it believed that States had the freedom to choose the means of settling their disputes under Article 33 of the Charter.

88. On the topic "The law of the non-navigational uses of international watercourses", Thailand well appreciated the complexities of the subject, having benefited from the experience of its cooperative endeavours with its close neighbours on the Mekong River, a precious regional resource whose full potential had yet to be realized.

89. In fleshing out the still ill-defined concept of "equitable and reasonable utilization" contained in draft article 5, a balance must be struck between the sovereign rights of a State and the community of interests. His delegation recognized, however, that the diversity of circumstances defied any attempt at formulating a cure-all definition. That task was perhaps best left to the specific agreements, in view of the provisions of paragraph 1 of draft article 6. Pending specific agreement, a balance of interests might be achieved through the consultations provided for in paragraph 2 of draft article 6, again taking into account the relevant factors contained in paragraph 1. Consultations could also serve as a connecting joint in the articulation of draft article 5, on equitable and reasonable utilization and participation, and draft article 7, on the obligation not to cause appreciable harm. Under no circumstances, however, should the process of consultation give rise to anything akin to a veto which barred utilization.

90. On the question of the relationship between the framework convention and specific agreements, the Committee should not overlook the intended residual character of the framework convention. Furthermore, the rule of interpretation that the general did not derogate from the specific should also be relevant. A presumption of precedence should therefore be in favour of specific agreements, pre-existing or otherwise.

91. Mr. GÜNEY (Turkey), speaking on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that the codification and progressive development of international law in that field was mainly concerned with the definition of, firstly, the obligation to prevent or minimize the risk of transboundary harm and, secondly, liability in the event of actual harm. The difficulty in that approach lay in the fact that the elements in question had not been sufficiently substantiated in positive law. Moreover, State practice in that field was still limited. In that connection, the United Nations Conference on Environment and Development had permitted the international community to reaffirm its desire to protect the

(Mr. Güney, Turkey)

environment and to adopt principles such as the principle contained in the Rio Declaration on Environment and Development which provided that States should ensure that activities carried out within their jurisdiction or under their control did not cause harm to other States or to the global commons.

92. Within the framework of preventive measures, the Commission considered lawful activities and envisaged the establishment of the obligation to enact laws and administrative regulations and enforce them, in order to ensure that those carrying out the activities in question used the best available technology so as to prevent appreciable transboundary harm or minimize the risk of such harm. Thus, in respect of hazardous activities carried out within the jurisdiction of a State, the State's fundamental obligation would be to assess the risks involved, regulate the activities, devise solutions, notify and provide information. Anything beyond those obligations would be incompatible with the sovereign right of a State to conduct lawful activities in its national territory without the need for the prior approval of another State. The due diligence of the State of origin would be the determining factor. Similarly, the need for protection of the innocent victim meant that the victim should receive compensation for the harm suffered. Moreover, as the Special Rapporteur pointed out in his ninth report, it was the people or the environment of the State of origin which was the first to be harmed by a hazardous activity and, in the end, it was that State which had a primary interest in requiring prior authorization (A/CN.4/450, para. 15). However, while the State of origin must fulfil the obligation of prevention, in no case should there be a suspension of the activities concerned or any veto by the potentially affected State. Proper evaluation by the State of origin of the planned activities with a view to preventing, controlling, reducing and mitigating the risk of harmful effects was amply sufficient.

93. Furthermore, the certainty of the potential risk of appreciable harm would set in train the notification and information procedures following prior assessment. What needed to be determined was the extent to which it would be useful to introduce formal consultations. It would not be reasonable to expect States of origin to refrain from lawful activities on the grounds that an assessment of those activities had pointed to the possibility of transboundary harm, particularly in cases where those activities were considered to be fundamental to the development of the country. It would surely be excessive for the relevant provision to compel the State of origin to consult with all States which might be affected, since that would in practice give those States a veto. What was needed then was cooperation based on good faith and undertaken in a spirit of good-neighbourliness.

94. Draft article 17 had a solid foundation. It might be useful to insert the phrase "and in a spirit of good-neighbourliness" after the words "in good faith".

95. As to draft article 18, his delegation considered that it had no place in the body of the instrument and should be deleted.

96. It would be useful if the Commission could specify in its long-term plan the next stages in its work and continue to work on the draft articles on international liability. Such liability should include the obligation of

(Mr. Güney, Turkey)

compensation for harm to be paid by the perpetrator of the harm. The legal regime to be established should be based on the liability of the operator rather than that of the State. However, if transboundary harm resulted from activities entailing a risk of causing such harm, the States under whose jurisdiction or control the activities were carried out might be held liable.

97. Turning to the topic of State responsibility, he said that the Commission had dealt with the relevant draft articles on the basis of the fact that there was an inherent link between dispute settlement and State responsibility. The Commission had to decide whether the draft articles should include dispute settlement provisions, and in doing so it should take into account the unwillingness of States to submit to compulsory third-party dispute settlement procedures, and also the fact that the dispute settlement mechanisms should respect the principle of free choice of the means of settling disputes. In addition, it should take into consideration the extent to which the conclusions reached as a result of the dispute settlement procedures could be implemented, and it should be flexible with regard to reservations.

98. His delegation shared the opinion that a future convention on State responsibility would be incomplete and ineffective if it did not include a suitable procedure for the settlement of disputes. Current global trends seemed to indicate that a solution which respected a certain balance was desirable and indeed achievable. Such a balance would ensure that the future convention would not be diminished by the lack of appropriate dispute settlement procedures, and would also avoid a dispute settlement regime that would be too rigid. Priority should be granted to procedures already in force between the parties to a dispute.

99. It should be recalled that serious doubts persisted as to the need for a legal regime for countermeasures in the context of a codification exercise, and the question remained as to whether countermeasures were an appropriate means of coercing an allegedly wrongdoing State to go to dispute settlement or to acknowledge its wrong or make amends. Of course, resort to countermeasures by an injured State might raise the stakes in a dispute and it was difficult to see how a reaction to a wrongful act could appropriately be the perpetration of another wrongful act, which was a result of the inability of the international community to establish a system to ensure respect for international law. The Commission should therefore look at guarantees against the abuse of unilateral measures and attempt to find ways of strengthening them.

100. The dispute settlement procedure envisaged by the Special Rapporteur as an indispensable complement to a regime governing unilateral reactions deserved attention and thorough examination. Facilitating recourse to appropriate dispute settlement procedures with a view to making countermeasures more compatible with the rule of law and to minimizing their adverse effects would ensure the lawfulness of unilateral reactions within acceptable and necessary limits. The Special Rapporteur's proposal meant that the exhaustion of settlement procedures should be a "parallel" obligation rather than a condition to be met before resorting to countermeasures. Therefore everything would depend on the situation existing between the allegedly wrongdoing State and the allegedly injured State concerning means of dispute settlement. A distinction should be made between what was desirable and what was possible, and it would be

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more realistic to deal with the matter in the context of a simple and flexible mechanism which would encourage States to settle their disputes expeditiously. Under such a mechanism, judicial settlement should only be envisaged as a last resort. Furthermore, in order to avoid an adverse effect on the acceptance and ratification of the future convention on State responsibility, the dispute settlement mechanism should necessarily include an "opt in, opt out" clause. Although it was for Governments to decide whether to accept or reject dispute settlement obligations, it would be pragmatic to provide guidelines and to leave the determination of appropriate mechanisms to the diplomatic conference which would adopt the future convention.

101. Mr. BARBOZA (Chairman of the International Law Commission) said that the Sixth Committee's discussion of the Commission's report (A/48/10) had been most useful. Such work was part of the vast process of codifying and developing international law, at the centre of which was the United Nations. As well as written rules, a considerable corpus of customary law had been developed - for example, the provisions of general international law that had arisen from the negotiations in the context of the Third United Nations Conference on the Law of the Sea. The codification and progressive development of international law were essentially a dialogue between the codifying bodies of the United Nations, the International Law Commission and Governments. The Sixth Committee was an ideal forum for the exchange of views and information, providing the Commission with the opportunity to gauge the reaction of the international community to its work. The Commission's experts could not act in a vacuum and as a subsidiary body of the General Assembly the Commission needed constant support in carrying out its mandate under Article 13, paragraph 1 (a), of the Charter of the United Nations.

102. The Committee's deliberations would as usual be brought to the Commission's attention by means of the relevant summary records and the document entitled "Topical summary of the discussion held in the Sixth Committee", which were invaluable for the Commission's work. The Special Rapporteurs would receive complete transcripts of statements made relating to their topics.

103. He was pleased to note the recognition accorded the Commission's work. Particular appreciation had been expressed for the rapidity with which the Commission, through its Working Group, had fulfilled its mandate of drawing up a draft statute for an international criminal court. The successful outcome of that initiative would be highly significant in the process of institutionalizing the community of nations. Its success depended on many factors, of which the statute of the court was one of the more significant since it would regulate details ranging from the specific composition of the tribunal to the more far-reaching aspects of its legal function. The Commission was aware of its responsibility to ensure that the draft statute on the one hand met the current needs of the international community and, on the other hand, was flexible enough for a sufficient number of ratifications and accessions to be reached to enable the timely creation of an effective criminal international jurisdiction. That consideration was absolutely fundamental to the overall approach taken in the draft statute contained in the annex to the Commission's report. The opinions that had been expressed about such important and sensitive aspects of the draft statute as the relationship of the tribunal to the United Nations system were

particularly valuable. The Commission would take those opinions into account so as to arrive at solutions that would be generally acceptable.

104. With regard to the topic of State responsibility, the debate had once more confirmed the basic importance of that area of international law in ensuring the rule of law in international relations. The specific comments made by some delegations on the articles provisionally adopted by the Commission and on part two of the draft articles would assist the Commission in its second reading of the draft. The regime proposed in part three of the draft on the peaceful settlement of disputes had given rise to an interesting discussion which had largely reflected the various opinions expressed by Commission members. The Commission would take into account the concerns expressed over the sensitive question of countermeasures when it came to that important aspect of its work. As the Special Rapporteur on the topic had anticipated, the chapter of his report dealing with the consequences of the so-called international "crimes" of States (A/CN.4/453/Add.2 and 3, chap. II) had provided the basis for a worthwhile preliminary exchange of views which he would use to guide him in continuing his work.

105. Concerning the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said he was sure that everyone realized its importance and complexity in that many issues of traditional international law needed to be reinterpreted in the light of contemporary requirements. Some uncertainties had been cleared up by the decisions taken by the Working Group the previous year, and the adoption by the Drafting Committee of five articles seemed to demonstrate that the difficulties raised in plenary meeting with regard to those articles were not insuperable. It was to be hoped that both the Commission and States would be convinced of the fact that the approach taken towards the topic was in the interest of all and that States would be prepared to make concessions over some aspects of the draft. He believed that, as the basic ideas that made up the topic were consolidated in a more consistent way in the form of draft articles, it would become easier to identify major areas in which there was consensus and to concentrate on the more controversial issues.

106. The comments made in the discussion on the law of the non-navigational uses of international watercourses had been particularly instructive, particularly in those areas in which the Special Rapporteur intended to make some changes. Considering that the second reading of the draft articles was already under way, the Special Rapporteur's optimistic assessment that the draft only required fine-tuning seemed to be well founded.

107. As to the chapter of the report on other decisions and recommendations of the Commission, he was pleased to note that the Sixth Committee supported the planning of the activities for the remainder of the current quinquennium proposed by the Commission. He had also noted that some delegations had stressed that the Commission should not focus on the issue of an international criminal court to the detriment of consideration of the draft Code of Crimes against the Peace and Security of Mankind and that the two issues should progress in parallel. He was also pleased to note that the Sixth Committee had expressed strong support for the two topics proposed by the Commission in its long-term programme of work.

(Mr. Barboza)

108. In conclusion, he said that the Commission attached great importance to the International Law Seminar, which enabled young professors and lawyers, particularly from developing countries, to become acquainted with the work of the Commission and a number of specialized agencies based in Geneva. He hoped that the General Assembly would urge those States which were in a position to do so to make the necessary financial contributions so that the 1994 session of the Seminar would have as broad a participation as possible.

The meeting rose at 1.10 p.m.